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Meet Michael Volkov

Shareholder in LeClair Ryan's Compliance, Investigations and White Collar Criminal Defense Practice Area; former federal prosecutor

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by Donna Boehme

Five essential features of the Chief Ethics and Compliance Officer position

» The CECO position is often created in haste, repented in leisure.
» The CECO position merits the board's full attention as part of its oversight duties.
» A 2012 PWC study shows number of CECOs reporting to the GC has declined by 6%.
» Regulators, prosecutors, and policymakers have a heightened interest in the CECO structure.
» All CECO positions should be fit-for-purpose, but five essential features are universal to all.

The following article is Part 1 of a two-part series, and is an excerpt from an upcoming addition to the SCCE Complete Compliance and Ethics Manual, *Winter Update, January 2013. For more information, visit: www.corporatecompliance.org/Products/ProductInfo/productcd/MANUAL.aspx*

In an ideal world, a company that is establishing a new chief compliance and ethics officer position (CECO) would dedicate considerable time and effort to high-level strategic thinking, contemplating the mandate for the function, the proper positioning for the officer, the competencies necessary for the new position, and the resources required to do the job. After all, as your mother always told you, anything worth doing is worth doing well. But all too frequently, as reflected in the steady parade of companies with failed compliance programs in the headlines, the CECO position is created in haste and repented in leisure.


Boehme

Case in point: a global scandal-plagued company recently made a big announcement: the appointment of a new "chief compliance officer" and a corresponding "infrastructure." The press release may have played well with regulators, shareholders, and the media, but the reaction in the CECO community was … a collective yawn. That's because just beneath the flashy press headline were the less-than-impressive details: The general counsel was taking on the additional CECO title and one of his in-house legal direct reports was adding a "deputy compliance officer" role to her business card. Both were keeping their existing full-time jobs and "adding on" the second set of duties. New titles, same people, same old organizational chart. As Joe Murphy, a leading compliance practitioner commented: "So what, exactly, changed? They took two people who already had full-time jobs and put another title on them. Was this supposed to send a positive message? Maybe it just sends the message that this is a company that still doesn't get it."[1]

Roy Snell, CEO of the Society of Corporate Compliance and Ethics, has even harsher words on the topic: "The people who were hiding under the table when the problems occurred in the past don't know how difficult it is to fix the problems you find. If they would have looked for, found, and actually fixed all the problems, they would know how tough this job is."[2]

It is increasingly clear that the structuring of the CECO position, and by extension, the overall compliance program, is the single most important indicator of whether the program will succeed or fail. For that reason, the CECO position demands the close attention and deliberation of the governing authority. Under the Federal Sentencing Guidelines for Organizations, the board has a key role to oversee the company's compliance and ethics program. This starts with the proper structuring of the CECO position.[3] Former federal prosecutor Michael Volkov asks two basic questions to gauge the strength of a compliance program: "Does the [CECO] have independent authority and reporting access?" and "Does the [CECO] have the resources needed to carry out the job?"[4] Although it is true that when it comes to compliance programs and CECOs, no one size fits all, certain principles such as independence, empowerment and "seat at the table" are universal.[5]

Structuring for success

Following is a discussion of five essential and interrelated features to be carefully considered by boards and senior management who are serious about structuring (or updating) the CECO position for success. Whatever an organization's structure, size, complexity, industry, regulatory environment, or risk portfolio, its CECO position must reflect the following.

Essential feature #1: Independence

The CECO must have sufficient authority and independence to oversee the integrity of the compliance program. Levers of independence include reporting line, unfiltered board access, a nondiscretionary escalation clause, an employment agreement, prior board approval required for any change in employment terms (including dismissal), an independent budget, and an adequate staff to properly manage the overall compliance program.

Of these elements, reporting line has generated the most controversy, particularly on the question of whether the CECO should report to the general counsel (GC). Many in the GC community incorrectly view compliance and ethics as a strictly legal function, and champion a CECO role that is either held by the GC, or reports to the GC. In the CECO community, the call for a stand-alone position, unfiltered by the GC or any other company officer, has grown from a whisper to a roar.[6] Corporate scandals in the headlines continue to illustrate the potential weaknesses of the GC-controlled model and spotlight issues such as conflicts of interest, competing mandates, and filtering of vital information from the governing body.[7] Many regulators, prosecutors, and policymakers are increasingly taking the view that a reporting line to the GC provides insufficient independence and authority for the CECO.[8] This trend is also reflected in a recent industry study indicating that the CECO-reporting-to-GC model declined by 6%, from 41% in 2011 to 35% in 2012, among the companies surveyed.[9]

Essential feature #2: Empowerment

The CECO must have the appropriate unambiguous mandate, delegation of authority, senior-level positioning, and empowerment to carry out his/her duties. More and more companies are opting to create the CECO mandate via board resolution and a compliance program charter, adopted by the board.[10] The CECO's job description is another tool to further clarify the function's mandate, and at a minimum should encompass the single-point accountability to "develop, implement and oversee an effective compliance and ethics program to detect and prevent misconduct." A close working relationship with an independent board committee, unfiltered by any other company officer, is a strong indicia of both empowerment and independence.

Essential feature #3: Seat at the table

The CECO must have formal and informal connections into the business and functions of the organization—a seat at the table at important meetings where all major business matters (e.g., risk, major transactions, business plans) are discussed and decided. For example, any company that holds an annual senior management meeting of the top 10% of its company leaders, but does not invite the CECO to the table, fails this criteria. At a minimum, the CECO should participate in budget reviews, strategic planning meetings, disclosure committee meetings, operational reviews, and risk and crisis management meetings.

Essential feature #4: Line of sight

The CECO must have unfettered access to relevant information to be able to form independent opinions and manage the program effectively. Where important areas of risk such as safety or environment are "carved out" from the CECO's line of sight, the CECO will be unable to perform adequate oversight of the program for that risk, and oversight for related areas will be impaired. Correctly structuring the line of sight also enables the CECO to coordinate and leverage compliance activities, and to decrease "compliance fatigue" in the organization. This does not mean that every risk area or subject matter expert must report to the CECO administratively, but formal mechanisms should be established to integrate those compliance activities into the overall program, as overseen by the CECO. If any part of the organization is immune to the CECO's line of sight, that is the first place to look for problems.

Essential feature #5: Resources

The CECO must have adequate resources (i.e., budget and headcount) to get the job done. The principle of independence also supports the dedication of standalone resources to the CECO and program, rather than a shared budget with another function (e.g., Legal). Headcount can be either personnel reporting to the CECO, shared resource, or "dotted line" resources (part-time or full-time) identified and dedicated to the compliance program from other parts of the organization. Some companies have also developed senior-level "compliance leaders" in the business units and functions of the organization to implement compliance activities in their areas—an evolving best practice that also increases the CECO's line of sight. Individuals throughout the organization can be designated and trained to perform critical roles (e.g., subject matter expert, compliance risk owner, or investigation leader) in the compliance program as long as they are properly linked to the CECO and the program through dotted line reporting, performance evaluation input or other similar mechanisms. ✷

Stay Tuned for Part 2: "Frequently asked questions about structuring the CECO position" (including Should the CECO report to the CEO? What is meant by Board access? What is the remit of the typical 'Compliance Committee'? and Can the GC also be the CECO?)

1. To read the full discussion, go to: http://community.corporatecompliance.org/CORPORATECOMPLIANCE/Communities/DiscussionGroups/ViewThread/?GroupId=97&MessageKey=8d46b1b8-1120-4272-afad-85dc4d6c0f13
2. Roy Snell: "Letter from the CEO: Speaking for Our Profession." *Compliance Today*, July 2011, page 20.
3. Michael D. Greenberg: "Directors as Guardians of Compliance and Ethics within the Corporate Citadel: What the Policy Community Should Know." 2010. Available at http://www.rand.org/pubs/conf_proceedings/CF277.html
4. Michael Volkov: "Empowering Compliance Officers: The Key to an Effective Compliance Program." *Corruption, Crime and Compliance blog*, May 18, 2012. Available at http://www.jdsupra.com/legalnews/empowering-compliance-officers-the-key-54542/
5. Michael D. Greenberg: The 2009 Rand Symposium Report, Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds: What the Policy Community Should Know. 2009. Available at http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2009/RAND_CF258.sum.pdf
6. For example, see "The Case for A Standalone Chief Compliance Officer Position" (Corpedia) *Ethisphere* white paper. Available at http://m1.ethisphere.com/resources/whitepaper-separation-of-gc-and-cco.pdf and Jose Tabuena: "Fitting a square peg in a round hole: Addressing the inherent conflict when the compliance officer is also the general counsel." *Corporate Secretary, September 2009*. Available at http://www.corporatesecretary.com/articles/regulation-and-legal/11191/fitting-square-peg-round-hole/
7. Donna Boehme: "WalMart. Whistleblower. Whitewash. Talk Amongst Yourselves." *Whistleblowers Protection Blog*, May 4, 2012. Available at http://www.whistleblowersblog.org/2012/05/articles/corporate-1/walmart-whistleblower-whitewash-talk-amongst-yourselves/
8. See further discussion in Boehme: "The Real Happy Marriage Between the GC and the Compliance Officer (An Open Letter to Ben Heineman). *Corporate Counsel*, May 2012. Available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202550879126&The_Real_Happy_Marriage_Between_the_GC_and_Compliance_Officer
9. "Broader Perspectives; Higher performance. State of Compliance: 2012 Study" *Compliance Week* and PriceWaterhouseCoopers, June 2012. Available at http://www.pwc.com/en_US/us/risk-management/assets/2012-compliance-study.pdf
10. See Tenet Healthcare Corporation's Quality, Compliance and Ethics Program Charter (effective Sept 27, 2011). Available at http://www.tenethealth.com/About/Documents/Ethics%20and%20Compliance/Final%20Tenet%20Compliance%20Program%20Charter_08_30_2011.pdf

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